Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 1 0 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

REPLY COMMENTS OF

Black Citizens for a Fair Media
Center for Media Education
Chinese for Affirmative Action
Communications Task Force
Hispanic Bar Association
League of United Latin American Citizens
National Conference of Puerto Rican Women
Office of Communications of the United Church of Christ
Philadelphia Lesbian and Gay Task Force
Telecommunications Research Action Center
Wider Opportunities for Women
Women's Institute for Freedom of the Press

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July 10, 1995

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REPLY COMMENTS

The Black Citizens for a Fair Media, Center for Media Education, Chinese for Affirmative Action, Communications Task Force, Hispanic Bar Association, League of United Latin American Citizens, National Conference of Puerto Rican Women, Office of Communications of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research Action Center, Wider Opportunities for Women, and the Women's Institute for Freedom of the Press [hereinafter Commenters] respectfully submit the following Reply Comments in response to the Commission's Further Notice of Proposed Rule Making, FCC 94-322, released January 17, 1995 [hereinafter Further Notice, or FNPRM].

In their original filing, Commenters argued the Commission's national, local and radio cross ownership rules should be retained because further concentration of ownership by limiting or eliminating the ownership rules would negatively effect the availability of diverse communication outlets through which viewers and listeners obtain news and public affairs programming. Nothing in the comments filed in this proceeding demonstrates that modifying or repealing the rules would increase diversity. Therefore, these Reply Comments are limited to addressing a Report entitled An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules [hereinafter "the Report"].[1] Although this Report is impressive in size, taking up an extraordinary amount of paper, its conclusion that greater concentration leads to greater diversity is unsupported and seriously flawed. Moreover, like the other commenters filed in this proceeding, the Report presents no basis for modifying or repealing the ownership rules.

To assess the validity of the Report's analysis and conclusions, Commenters consulted with Dr. Robert G. Picard, Chairman of the Department of Communications at California State University, Fullerton and Dr. Mark Cooper, Director of Research at Consumer Federation of America. As discussed in their attached statements, both Dr. Picard and Dr. Cooper concluded that the Report was fundamentally flawed because it inappropriately applied a narrow antitrust standard to the broadcast television industry. See Picard at 2; Cooper at ¶ 4-8. They found that application of such a narrow standard ignored Congressional intent that the "information market" be governed by the Communications Act of 1934 and its amendments, and not by

[1] The Report was prepared by Economists Inc. and filed on behalf of Westinghouse, CBS, NBC and ABC.

antitrust law. Id. Dr. Picard and Dr. Cooper also found the Report incorrectly suggested that cable, videocassette recorders and other media were substitutes for broadcast television, contradicting the Report's own exhibits which clearly demonstrated the competitive advantages of broadcast television over other services. See Picard at 2-4; Cooper at ¶ 9-10, 27-34.

In addition, Dr. Picard and Dr. Cooper demonstrated that the Report overstated the existence of competition in the market for news and public affairs programming.[2] And in doing so, they found the Report dramatically understated the negative effects changes in the ownership rules would have on competition. See Picard at 4-5; Cooper ¶ 14-26. Thus, both Dr. Picard and Dr. Cooper concluded that utilization of a competition model, as proposed by Economists Inc., not only ignored the Commission's intent to prevent a monopoly of information providers over the airways, but also ignored the Commission's longstanding mandate to broadcast in the public interest. See Picard at 5-6; Cooper at ¶ 3-5, 27-28.

Dr. Picard and Dr. Cooper's conclusions directly support Commenters findings in their original filing--that there is at present, no substitute for the freely accessible news and public affairs programming provided by broadcast television. Thus, even

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[2] See also Diane Mermigas, Course is Set for More Media Deals, Electronic Media, (July 3, 1995)(quoting Bill Lisecky, who raises debt and equity for broadcast clients of Communications Equity Associates, "[i]f you look at the top 20 TV station groups, there already is concentration of coverage and money. The only thing constraining them from becoming big gorillas are the rules.").

if the ownership rules could be repealed from a narrow antitrust point of view without subsequent harm to the interests of advertisers as the Report suggests, repeal of these rules would certainly harm viewers and listeners as it would greatly decrease the number and diversity of voices speaking through our communications mediums and diminish diversity of programming.

Conclusion

For these reasons, the national, local and radio cross ownership rules should be retained.

Respectfully submitted,

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July 10, 1995

Statement of Robert G. Picard, Ph.D.,
Chairman, Department of Communications
California State University, Fullerton

My name is Robert G. Picard, Ph.D, and I am editor of the Journal of Media Economics. I am also a professor in, and chairman of, the Department of Communications at California State University, Fullerton, the largest mass communication program west of the Mississippi River and the second largest in the nation.

I am the author of more than 200 articles and numerous books on the economics of media, communication policy and media issues including Media Economics: Concepts and Issues, Press Concentration and Monopoly, and The Cable Networks Handbook. I have testified on such issues in Congress and state legislatures on several occasions and have been a consultant to the U.S. Department of Justice and media companies and labor organizations on similar topics.

I have read the report, "An Economic Analysis of the Broadcast Television National Ownership Local Ownership and Radio Cross-Ownership Rules," [hereinafter "the Report"] prepared by Economists Incorporated. Although impressive in its size, the Report is seriously flawed as a basis for Commission action because it takes an extremely narrow view of the issues and concerns before the Commission, conveniently mixes and blurs the distinctions between media and their markets, ignores differences in media use by audiences and advertisers, and accepts definitions and indicators of concentration that are not recognized in statutes.

I. THE REPORT INCORRECTLY SUBSTITUTES ANTITRUST ENFORCEMENT IN PLACE OF COMMUNICATIONS POLICYMAKING

The Report's largest flaw is that it seeks to have the Commission substitute mere antitrust enforcement in place of communications policymaking and promotion of broadcast operation and ownership in the public interest, convenience and necessity. The Report by Economists Inc. takes an extremely narrow approach to the issues before the Commission. Its approach is to apply competition policy to the questions of ownership and offer that approach as the only appropriate basis for policy. Not only does it narrow discussion to competition policy, but it further narrows the focus to only antitrust questions, essentially attempting to take ownership issues out of the hands of the Commission and subjecting them to provision of antitrust statutes and their interpretations by the courts and the Justice Department. Even in doing so, however, the Report does not make a credible case because its economic analysis and evidence is flawed and contradictory.

II. THE REPORT INCORRECTLY SUGGESTS THAT CABLE, SATELLITE, VIDEOCASSETTE RECORDERS AND OTHER SERVICES ARE SUBSTITUTABLE FOR AND COMPETITIVE WITH BROADCAST TELEVISION

The biggest error comes from the Report's efforts to cast all delivered video in the same product market. To do so, it attempts to argue that broadcast video, cable video, satellite and other non-broadcast video services, as well as video cassettes are substitutable and directly competitive. While there may be some significant overlap in the content provided by some of these services, to suggest that videocassettes are a substitute for local network, or cable news and public affairs programming or that pay cable services are substitutes for free television defies every previously known definition of media markets. In fact, the Report is able to assert this definition only by deliberately removing price as a factor in substitutability and replacing it with a vague, and unproven concept--quality. Although quality is clearly a goal in communications policymaking, its use as the primary element in defining demand in a product market is nonsensical.

The Report's efforts to blend all video markets into one single, unified market is contradicted by its own exhibits, especially "H" through "L" which show the competitive advantages of broadcast over cable and other services. Further, the Report would have the Commission believe that having access to cable is the same as actually receiving it and that having access to videocassettes for sale and rental is the same as actually doing so. It is only through this convoluted reasoning that it can attempt to argue all video is in the same market. It does so by ignoring the facts that 40% of all households with television are unwilling or unable to subscribe to cable, satellite and other video services and that only about half of the subscribers to those services are willing or able to subscribe to premium services. Such figures indicate the majority of the public do not view the products as substitutable and that the price for non-broadcast services is a major factor.

There is admittedly competition between broadcast stations, cable and related services for audiences, however, it exists only to the extent that those services are actually present in households--about 40% less than indicated in the market definition accepted and utilized in the Economists Inc. Report.

III. THE REPORT IGNORES DIFFERENCES IN MEDIA USE BY AUDIENCES AND ADVERTISERS

The Report explores competition in the advertising market by including all advertising expenditures, for all media, in its analysis. This grossly overstates the nature of the market and its level of competition. In fact, most major antitrust cases--and the Justice Department--narrow the market because advertisers typically limit substitutability in their choices by using formulae that divide budgets into different media types--video, audio, print, etc. Thus, it is incorrect to assert direct competition between types in the short run and the relevant market should be limited to those media providing services within the broad type.

The Report's reliance on evidence of the amount of competition in the five "illustrative" DMAS it chose to study is flawed by all the above difficulties. Even if one chose to ignore those problems, the results are neither significant nor valid in the scientific sense because the sample is too small and one must significantly question the selection of DMAS. As a result, the entire bases of the Report is flawed and the value of its conclusions highly questionable.

The Reports reliance on HHI to prove or disprove concentration is problematic. First, its computations are skewed by its product and geographic market definitions. These, as shown above, are flawed and vastly overstate the existence of competition, thus skewing the HHI's to show competition that does not exist and that the effects of changes in ownership rules will not harm competition. Second, the Reports use of HHI's would leave one to believe that HHI's are the definitive proof of concentration. In fact, HHI's are used by the Department of Justice as merely a yardstick by which to measure the effects of a proposed acquisition or merger to determine if intervention is warranted. They are also used in private litigation to provide a statistical measure. HHI's, however, are not the only means of considering competitive or anticompetitive effects.

CONCLUSION

The public's interest in a competitive broadcasting system is best served by widespread ownership. Using the kind of antitrust analysis proposed by Economists Inc. would, in effect, place the Commission in the position of substituting antitrust regulation for its broader mandates. Even under an antitrust analysis, the Commission should still not lessen the broadcast ownership, national ownership and radio cross-ownership rules beyond those which would meet the failing firm test in mergers or acquisitions.

I urge the Commission to disregard the conclusions of the Economists Inc. Report for all the above reasons. Further, there has been no reasonable showing of the need to alter the rules nor that the public will in any way benefit from the proposed changes.

STATEMENT OF DR. MARK N. COOPER

JULY 10, 1995

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I. BACKGROUND AND CONCLUSION

1) My name is Dr. Mark N. Cooper. I am Director of Research at the Consumer Federation of America.

2) I have been asked by the joint commentors[1] to review the study submitted by Economists Incorporated in this proceeding.[2]

3) I conclude that the analysis presented by Economists Incorporated should be rejected by the Commission as a basis for its rules.[3] The report is based upon faulty legal, economic and empirical reasoning. The conclusions it reaches are unproven and incorrect. Consequently, the policy recommendations it makes would not be in the public interest.

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[1] Comments of Black Citizens for a Fair Media, Center for Media Education, Chinese for Affirmative Action, Communications Task Force, Hispanic Bar Association, League of United Latin American Citizens, National Conference of Puerto Rican Women, Office of Communications of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Wider Opportunities for Women, Women's Institute for Freedom of the Press, In Re: Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, May 17, 1995.

[2] Economists Incorporated, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, In Re: Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, May 17, 1995 (hereafter, Economists or the report).

[3] Federal Communications Commission, Further Notice of Proposed Rulemaking In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, January 17, 1995 (Hereafter, FNPRM).

II. MISDEFINING THE QUESTION, MISSTATING THE ANSWER

A. THE REPORT ADOPTS AN INAPPROPRIATE STANDARD OF INDUSTRIAL ORGANIZATION FOR THE BROADCAST TELEVISION INDUSTRY.

4) The most fundamental flaw is the legal premise of the entire analysis. The analysis asserts that the Federal Communications Commission should apply an anti-trust standard to the broadcast television industry.[4] However, if Congress had intended for the form of industrial organization of the broadcast television industry to be governed solely by the anti-trust laws, it would not have passed the Communications Act and its amendments.[5]

5) In fact, because policymakers recognize the uniquely important role that broadcast television plays in the marketplace of political ideas and in forming cultural values, it has imposed a higher standard on the industry.[6] What is good enough in the

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4 Ibid., p. 3.

5 The authors further assert that there is a presumption applied in the anti-trust field -- that mergers will enhance consumer welfare and therefore those who seek to block them bear the burden of proof (Economists, p. 6). Even if this were the correct public policy stance for anti-trust analysis, it is not clear that it would apply to the broadcast TV industry. Congress has, in fact, stated a presumption in favor of diversity and one can argue that those who seek greater concentration should bear the burden of proof.

6 The FCC recognizes this public policy decision when it notes the following (FNPRM, pp. 54-55).

> However, we are concerned that, given our diversity requirements, a merger guideline based standard might be too low. The purpose of the merger guidelines is to define the point at which heightened antitrust scrutiny

economic marketplace is simply not good enough in the political and cultural marketplace.

B. THE REPORT USES AN ECONOMIC STANDARD THAT IS FAR TOO WEAK.

6) Not only does the study fail to recognize the unique nature of the broadcast "commodity", it then consistently applies the lowest economic standard possible. Only where a market or market segment is found to be highly concentrated does the study accept the fact that further concentration might pose a problem, and even here it invokes a variety of specious arguments to urge the Commission to allow greater concentration in the industry.

7) The highly concentrated standard, is in fact a very weak standard. This standard identifies a market that is roughly equivalent to one in which there are fewer than six equal sized firms. While it is clear that markets at this level of concentration are a source of grave concern, it is not clear that market at moderately lower levels of concentration are no concern.

> Where is the line to be drawn between oligopoly and competition? At what number do we draw the line between few and many? In principle, competition applies when the number of competing firms is infinite; at the same time, the textbooks usually say that a market is competitive if the cross effects between firms are negligible. Up to six firms one has oligopoly, and with fifty firms or more of roughly equal size on has competition; however, for

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is required. Our purpose in encouraging diversity in broadcast service is not to merely meet a minimum acceptable benchmark, but rather, to encourage a wide array of voices and viewpoints.

sizes in between it may be difficult to say. The answer is not a matter of principle but rather an empirical matter.[7]

8) Even the moderately concentrated threshold of the Merger Guidelines, equivalent to a market composed of ten firms of equal size, barely begins to move down the danger zone of concentration.

C. THE REPORT USES THE WRONG EMPIRICAL MEASURE.

9) Having chosen an inadequate standard, the report then measures concentration in a fundamentally incorrect fashion. It creates and consistently relies on an equal shares index. This consciously and incorrectly ignores the market reality.[8] Instead of using the actual market structure, it assumes a market structure in which all firms are equal in size. It should come as little surprise that it is hard to find actual concentration when the report simply assumes it away.[9]

10) The inclusion of such a conceptually and empirically flawed index distorts and destroys the evidence presented.[10] In virtually

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[7] J. W. Friedman, Oligopoly Theory (Cambridge: Cambridge University Press, 1983), pp. 8-9.

[8] FNPRM, para 34, invites comment on this measure of market structure.

[9] Economists, p. 11.

[10] The fact that a number of small firms have failed to gain market share cannot be ignored. Their mere existence should not be given more weight -- without justification -- than their actual

every table the first column of data presented is an artifact of incorrect assumptions.[11]

11) The FCC has put forward a series of market definitions and a variety of measures of industry structure for comment.[12] Ignoring market shares is unacceptable. Public policy must begin with the actual market structure as its starting point. Therefore, I analyze only actual market structure of the product and geographic markets defined by the FCC, even though I find those markets too broadly defined in some instances.

12) Furthermore, the FCC discussion occasionally invokes a specific measure of market concentration, the Hershman-Herfindahl Index (HHI),[13] but the ownership rules should not be decided by HHI alone. The importance of broadcast diversity to the nation's political system and cultural values suggests that HHI would be a very crude measure of industry organization at best.

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market share accords them.

[11] The mistake is compounded when the advertising market is examined by assuming, for example, that there are two equal sized Yellow pages providers (Economists, p. 27). In fact the Yellow Page operations of the Regional Bell Operating Companies have market shares in excess of 90 percent by every measure. This point is rendered moot, however, since, contrary to the arguments in the report, Yellow Pages is not part of the market for advertising in which broadcast TV operates.

[12] Especially FNPRM, para. 32 and 34.

[13] For example, FNPRM at para 89.

13) Keeping these caveats in mind, the remainder of this statement shows that, even if we rely on HHI, when we strip away the misdefinition of the questions and the misstatement of the answers, we find an industry that is already quite concentrated, as Table 1 shows.

II. A CONCENTRATED INDUSTRY

A. THE MARKET IS CURRENTLY CONCENTRATED.

14) Starting from the Commission's proposed definitions of markets, and utilizing only data supplied by the Report, we find that only the local advertising market in New York fails to exceed the moderately concentrated standard of the DOJ Merger Guidelines. All other local markets exceed the moderately concentrated standard for advertising and programming. By the Commission's definitions, four-fifths of the local markets measured by viewing are highly concentrated and three-fifths of the local advertising markets are highly concentrated.

15) By the Commission's standard, the national advertising market is on the high side of the moderately concentrated range, while the national programming market is on the low side of the moderately concentrated range.

B. SUPPLY-SIDE EVIDENCE DOES NOT SUPPORT A BROADENING OF THE COMMISSION'S MARKET DEFINITIONS OR RELAXATION OF ITS OWNERSHIP RULES.

16) The Report repeatedly asserts that the Commission's market definitions are too narrow, both across product and geographic lines. The evidence presented does not support the conclusions. The only new systematic body of evidence presented deals with the advertising market.[14] The report presents a compilation of advertising expenditures by the 60 largest advertisers in the national market.[15] This evidence is produced to challenge the definition of the national advertising TV market, which excludes spot advertising and newspapers.

17) The authors have misinterpreted this data. Contrary to showing that various media are substitutes, it shows that advertisers tend to specialize in specific mediums. In particular, advertisers who use newspapers significantly are not likely to use network TV and visa versa.

18) Figure 1 plots the percentage of advertising expenditures on network TV against the percentage of expenditure on newspaper advertising. It is quite clear that newspaper advertisers cluster

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[14] The report cites a self-serving survey of a small number of advertising executives and anecdotes about competition, none of which can form the basis for systematic analysis of market structure.

[15] Table E-11.

at the top left (newspaper users but not network TV users) and network TV advertisers cluster at the bottom right (network TV users but not newspaper users).

19) Figure 2 shows a similar plot with network TV, cable and syndicated TV plotted on the X axis. This is the group of commodities that the FCC uses to define its national TV market. The clustering is even clearer. Of the 60 advertisers included in the survey two thirds spend half their dollars on either newspaper or national TV advertising mediums and very little on the other.

20) More sophisticated analysis corroborates this impression. As Table 2 shows, advertising on networks, syndicated channels and cable TV tends to be positively correlated with each other (with all correlations are moderate to large and statistically significant). All three of these are negatively correlated to advertising in newspapers (with all correlations moderate to large and statistically significant). All three of these are negatively related to advertising in spot TV markets (with correlations small and only one statistically significant).

21) A factor analysis of these patterns of spending further supports this interpretation (see Table 3). Four factors were extracted from the data, accounting for almost three-quarters of the variance. The first factor is clearly a national TV market, also defined by a lack of newspaper advertising. The second factor is a magazine advertising factor. The third factor is a spot (radio

and TV) advertising factor. The fourth factor is a radio advertising factor.

22) The strongly negative correlation between the national TV market advertising and newspapers and spot TV advertising takes on particular importance because of the nature of the sampled companies. Because the sample of companies is restricted to those with large budgets, the companies are disproportionately reliant on TV advertising. These 60 companies account for over half of the total national TV advertising market.

23) The fact that there is such clear specialization in these groups not only undercuts the claim that the national TV market should be defined more broadly but also raises questions about the broad definition used by the FCC in the local market. The pattern of factors suggests that the easy flow of advertising across media claimed by the report is questionable.

24) The arguments that economic efficiencies require a relaxation of the ownership rules are also not supported in the data. The evidence in support of economic efficiencies associated with greater reach or larger groups is anecdotal and suspect. If the efficiencies were as strong as claimed, one would expect to find the entire industry organized in groups that are at the limit allowed by the current rule. That is not the case at all.

25) Ten of the 26 groups identified in the Report could expand by at least one-third, without running into the restrictions on the number or reach of stations allowed. Another six could expand by twenty percent. Another six could expand by ten percent. Thus, of the 26 groups identified, 22, or 85 percent, could increase their size by at least ten percent. Clearly, the rule is not restraining the vast majority of the industry. Economic efficiencies cannot be very strong, if over four-fifths of the industry is organized well below the legal limits.

26) The FCC's finding that the presence of six over the air channels disciplines the pricing behavior of cable companies shed no light on the question of whether the existence of cable companies can discipline broadcast behavior. The effect of competition is not symmetrical. Cable companies may have greater difficulty raising prices when faced with a large number of a free stations, primarily because the majority of their viewership is simply the retransmission of free programming. That does not mean that free broadcast stations will be disciplined by pay cable companies which rely on the very programming they are supposed to discipline for their viewership.

C. DEMAND-SIDE EVIDENCE DOES NOT SUPPORT A BROADENING OF THE COMMISSION'S MARKET DEFINITIONS OR RELAXATION OF ITS OWNERSHIP RULES.

27) The report argues that viewing network television should be seen as competing not only with all other television programming, but with VCR rentals and, ultimately, with all others forms of entertainment. The empirical evidence presented does not support this conclusion. Broadcast television dominates television viewing. Above all, it dominates the sources of information and cultural viewing that are at the heart of the diversity rule.

28) Not only should the addition of these other sources to the diversity framework be rejected, but the FCC's discussion of sources of information, news and public affairs is also too inclusive. The FCC's discussion does not reflect the fundamental fact that television remains the dominant source for the American public. The Commission cannot rely on changes in the market to accomplish the diversity goals it has pursued with public policy because the changes in the market have not altered viewing patterns.

29) Television remains the dominant single source of news, compared to newspapers, radio and other sources. As Figures 3 and 4 show, television is just as dominant, perhaps even more so, today as it has been in the past.

30) Almost three quarters of the public cites TV as at least one of the primary sources of news, compared to about forty percent who mention newspapers and 25 percent who mention other sources. Almost half the public cites television as the sole, primary source of news. As the source of news for those who cite only one source, it is cited almost three times as often as newspapers and over four times as often as all other sources. In recent years newspapers have been declining.

31) Television is also by far the most credible source of news, As Figure 5 shows. Over half the respondents say it is credible, compared to less than a quarter who say newspapers are credible and only a tenth who say other sources are credible.

32) Television is also the predominant source of information for emergencies and products being cited between two and three times more frequently than the closest alternative source of information.

33) The FCC's suggestion that cable TV can be counted as a source of diversity is also doubtful. With its high monthly charge, cable TV has not penetrated as deeply in the population as broadcast TV. Because the monthly charge is so high, lower income groups are considerably less likely to subscribe to cable TV, as Figure 6 shows.

34) There is virtually no difference across income groups in the

percentage that watches network TV. Each of the other sources of information are sensitive to income levels. Cable TV shows the greatest variability across income groups. While 43 percent of households with incomes below $10,000 watch cable TV, over 70 percent of households with incomes above $50,000 watch cable TV. Thus, households that are most in need are least likely to be served if the Commission allows the inclusion of cable TV in its analysis to reduce public policies intended to stimulate diversity. This evidence does not support the FCC's suggestion that public policies to foster diversity can be relaxed.